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December 1, 2016

**BY ELECTRONIC & FIRST CLASS MAIL**

Mayor Joseph Sack & Members of the City Council  
City of Rye  
City Hall  
1051 Boston Post Road  
Rye, NY 10580

Re: Crown Castle  
Response to Citizens' Alternative Tower Plan  
As Filed By Zarin & Steinmetz and CityScape

Dear Mayor Sack and Members of the City Council:

We are writing to you on behalf of Crown Castle NG East LLC ("Crown") in furtherance of the November 16, 2016 correspondence provided to the City Council by the law firm of Zarin & Steinmetz and consulting firm CityScape. Their correspondence submitted a citizens' alternative wireless infrastructure plan for the City Council's "consideration" in this proceeding consisting of several tower sites ("Citizens' Alternative Tower Plan"). For the reasons more fully set forth in our letter, the Citizens' Alternative Tower Plan is not a credible alternative to Crown's distributed antenna system ("DAS") installed on existing utility poles.

**Citizens' Misplaced Legal Theories in this Administrative Proceeding**

We have previously supplied the City and counsel with relevant legal citations to the City/Crown RUA, federal, state and local statutes, and associated case law. Counsel's continued erroneous interpretations of case law involving Section 332 of the Communications Act simply obfuscates the legal scope of review for the City Council to follow in this administrative proceeding. The applicable legal criteria for the City's review as incorporated into the RUA do not include the obligation for Crown to prove a need for wireless services nor evaluate various alternative tower sites or prove that its plans are the "least intrusive" means of remedying a gap in service. These and corresponding standards of review are common law standards used by courts in evaluating



December 1, 2016

Page -2-

certain prohibition of service claims in litigation when municipalities impose actual or effective barriers to the provision of services as part of permit denials. This administrative proceeding, which is being conducted under the RUA, New York State law governing municipal consent for right of way access and corresponding federal laws, does not implicate the standards of review cited by counsel. As such, our client has asked us to focus on the facts in responding to the comments of citizens represented by Zarin & Steinmetz and CityScape.

### **Verizon “Need” Data Supplied to the City by Crown**

Crown from the outset supplied the City with actual empirical evidence that the planned DAS network expansion is needed to remedy gaps in and provide reliable Verizon wireless services in Rye. Counsel for various citizens is mistaken at best when they suggest that no actual empirical analysis of gaps in coverage has been supplied as part of the proceeding. As presented in the testimony of Mr. Gregory Sharpe, Senior RF Engineer, at numerous meetings and on maps publicly provided to the City, actual baseline drive test data of Verizon Wireless’ signal strength gaps have been supplied as part of this proceeding. Those maps were in fact shared with CityScape and are part of the public record. Additionally, in an effort to aid the citizen’s group, Crown’s consultants verbally shared with CityScape other proprietary information, including various technical and operational design parameters associated with Verizon Wireless’ network and planned improvements in Rye. Copies of the actual geographic areas associated with the DAS design (polygons) were also provided to CityScape. For a further discussion regarding this evidence already in the record, please see the enclosed December 1, 2016 report by Mr. Greg Sharpe.

### **Citizens’ Alternative Tower Plan & Crown DAS Plan Comparisons**

#### *A. Technical Assumptions*

In reviewing the Citizens’ Alternative Tower Plan, Crown has noted the plan’s overall lack of a technical discussion (i.e. anticipated coverage, capacity and service improvements). As discussed



December 1, 2016

Page -3-

in Mr. Sharpe's attached report, it appears CityScape did not collect wireless carriers' signal strengths as part of their assessment (which can be measured by any qualified consultant). That and other apparent technical assumptions included in CityScape's plan are erroneous and/or misplaced as noted by Mr. Sharpe.<sup>1</sup> Based on Mr. Sharpe's evaluation of the Citizens' Alternative Tower Plan, the "caveat" that data "would likely show that such gap is smaller than Crown Castle suggests" contained therein is nothing more than hyperbole.

*B. Least Intrusive - Community as a Whole or An Individual Citizen's Point of View?*

Curiously, counsel for citizens posits that the CityScape tower plan is an example of a "least intrusive" means to providing wireless services in Rye. The principal question is "least intrusive" how and to whom. Even the Second Circuit, when using this standard as applied to permit application denials, that make their way to litigation, has always focused on whether the means employed to improve services are least intrusive to the community as a whole, not from the perspective of any one individual or group of residents. See Orange Co.-Poughkeepsie Ltd. P'ship v. Town of East Fishkill, 84 F. Supp. 3d 274, 295, 300-303 (S.D.N.Y.), aff'd 632 F. App'x 1, 3 (2d Cir. 2015)(overturning denial of new tower in residential area of community). We suspect that a plan to construct 8-10 towers in Rye at heights of at least 100' AGL, if actually proposed by the wireless industry, would be met by significantly more opposition by the community as a whole and likely lead to a request for small utility pole installations like Crown's proposed DAS expansion.

*C. Neither Plan Involves Facilities Located On Residentially Used Properties*

Counsel for citizens states that the Citizens' Alternative Tower Plan involves all new tower facilities that are not on properties used for residential purposes. It should be noted that the Crown DAS pole attachments are not located on residential properties either. Rather, all Crown facilities are proposed on existing Consolidated Edison utility poles that are in public rights of

<sup>1</sup> CityScape erroneously asserted in its filing with the City that Verizon is proposing 64 DAS nodes **and two more towers** for Rye. The later assertion is false. In this regard, we understand that a tower company (unnamed in any drawings or other communications) is speculating in Rye and proposing towers in the community. That effort is independent of and not be associated with Crown or Verizon Wireless.



December 1, 2016

Page -4-

way owned in fee or by easement and located in City approved above ground utility corridors. See City of Rye Master Plan, Section 4, mapping for all public and private streets. As such, there is no distinction to be made related to underlying land uses, other than to note that Crown's DAS plan is consistent with the already existing utility uses in these public rights of way.

*D. FCC RFE Compliance is Presumed*

All Crown facilities would be compliant with FCC RFE regulations as demonstrated in reports already in the administrative record and reviewed by the City's consulting engineer. It is not clear what assumptions were used in the Citizens' Alternative Tower Plan for the statement that all tower sites proposed would be RFE compliant. Generally speaking though, Crown agrees with that assumption, i.e. that tower sites would be compliant with FCC RFE regulations just like the Crown DAS system.

*E. Is the Citizens' Alternative Tower Plan Obtrusive?*

As the City Council is aware, Crown Castle is a company that develops, owns and operates tower, rooftop, DAS, fiber and small cell infrastructure throughout the United States. It is not clear to Crown, however, what is meant by the statement in the Citizens' Alternative Tower Plan that all facilities shown on CityScape's map are "as unobtrusive as possible". As such, we have outlined various SEQRA factors and environmental effects of the Citizens' Alternative Tower Plan as compared to Crown's DAS expansion plans. This for the City Council to use as a guide in assessing the statements and assumptions made in the citizens' plan.

*1. SEQRA Classification Comparison*

Unlike Crown's DAS expansion, which we submit is a Type II Action for SEQRA purposes as set forth in prior legal memoranda provided to the City, the Citizens Alternative Tower Plan involves at least 7 new ground mounted towers ranging from 70' to 100' in height, a new rooftop tower 60' in height and likely two replacement towers. Based on the tower locations proposed, some of which are in historic districts and other critical environmental areas, the citizen's plan would likely be a Type I Action under SEQRA with a presumed environmental impact. See 6 NYCRR § 617.4.



December 1, 2016

Page -5-

## *2. Impact Comparisons*

Using the Full EAF Crown supplied to the City as a guide, a comparison between the Crown DAS expansion plans and the Citizens Alternative Tower Plan illustrates the significantly greater proportionate impacts associated with the citizens' plan as follows:

- **Impacts on Land** - A typical tower compound sized for collocation is 50' x 50' in area (2,500 sq. ft.) in which a tower and ground equipment are located. The Citizens Alternative Tower Plan involves at a minimum 7 new tower sites, which together with access driveways and other improvements involves over 20,000 square feet of disturbance. This as compared to zero square feet of ground disturbance associated with Crown's DAS expansion. We note that CityScape did not show a photo of the ground equipment typical for tower installations.
- **Impacts on Surface Water** - The towers advocated for in the Citizens Alternative Tower Plan are located in close proximity to Long Island Sound and other coastal areas. Unlike Crown's DAS expansion on existing utility poles, these new towers may have impacts and/or be inconsistent with other legal standards such as Rye's Local Waterfront Revitalization Plan. Additionally, depending on exact location, state and federal tidal wetlands and coastal erosion hazard requirements regulated by the NYS DEC and USACOE could be implicated by the citizens' plan.
- **Impacts on Flooding** - Several of the towers advocated for in the Citizens Alternative Tower Plan are in floodplain areas. In such areas, federal, state and local requirements, including FEMA flood hazard requirements, could prohibit and/or require elevating equipment further above grade and the base flood elevations. This as compared to Crown's DAS expansion where all equipment is located 8' or more above grade on an existing utility pole and does not implicate any flood related requirements or impacts.
- **Impact on Aesthetic Resources** - The Citizens' Alternative Tower Plan has no viewshed data associated with it to assess impacts on aesthetic resources as compared with the photosimulations and other data supplied as part of Crown's DAS expansion plans. Clearly, there will be greater visibility in the community as a whole associated with towers designed to extend above the tree line as compared with the discrete and non-cumulative



December 1, 2016

Page -6-

visibility associated with Crown's DAS nodes that involve 64 pole attachments of equipment on existing utility poles.

- Impact on Historic and Archeological Resources – There are historic sites located within a half mile of several of the towers proposed in the Citizens Alternative Tower Plan. Some are even located in a National Historic District. Under federal historic and environmental statutes (NHPA<sup>2</sup> and NEPA<sup>3</sup>), any such tower proposal would require evaluation by the New York State Office of Parks, Recreation and Historic Preservation Office (“SHPO”) for the potential for adverse historic impacts. In comparison, we note that Crown's DAS expansion plan has already been reviewed by SHPO and found to have no adverse historic impacts due to the nature of the installations on existing utility poles.
- Impact on Open Space and Recreation – The Citizens Alternative Tower Plan relies on several tower locations in municipally owned parks and areas of active recreation. No effort has been made to explain how the plan would avoid impacts to users of such open space and recreation areas. We also note that commercial towers located in dedicated parkland and used to serve areas outside of a park implicate the “public trust doctrine” and a prohibition on alienating parkland without an Act of the New York State Legislature.<sup>4</sup> Crown's DAS expansion plan in comparison is not physically located in a park or recreation area.
- Consistency with Community Plans – The Citizens' Alternative Tower Plan would introduce numerous towers above the tree line into Rye's visual landscape. Referring to Chapter 196 of the City Code, which would apply to the citizens' plan, it's clear that the City has a legislative preference against towers already. Indeed, were Chapter 196 legally applicable to Crown's DAS expansion plan, we submit that Crown's plan would involve the highest priority with attachments to “existing tall structures” whereas the Citizens' Alternative Tower Plan would involve several new towers in the lowest priority areas for the City. See City Code § 196-6.A.1.
- Consistency with Community Character - The Citizens' Alternative Tower Plan involves

<sup>2</sup> National Historic Preservation Act, 54 U.S.C. §§ 300101 et seq.

<sup>3</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

<sup>4</sup> Parkland Alienation Report, Office of the State Comptroller, 2014-MS-5, pg. 5.



December 1, 2016

Page -7-

new tower sites in and near highly visited public and private community resources including among others:

- Whitby Castle at the Rye Golf Club – An 1854 gothic revival building in the Boston Post Road National Historic District owned by the City of Rye.
- Shenerock Shore Club – A private club located on Milton Point.
- The Boat Basin – An active marina at the terminus of the Blind Brook River and owned by the City of Rye.
- Stuyvesant Pier – A New York State owned .10 acre parcel of land that is a pier adjacent to the American Yacht Club on Milton Point.
- Rye Town Park – An active public beach on Long Island Sound owned by the Town of Rye, a distinct municipal entity separate and apart from the City of Rye.

The Citizens' Alternative Tower Plan, which could interfere with the use and enjoyment of these officially recognized and designated public resources, certainly implicates a community character impact whereas the Crown DAS plan does not.<sup>5</sup>

#### *F. Section 6409 & FCC Regulatory Requirements*

Various commentary in the Citizens' Alternative Tower Plan with respect to federal statutes and FCC regulations which have removed municipal discretion for certain eligible facility modifications misses the mark.

The City has not exercised any discretionary regulatory authority with respect to public right of way access for electric utilities, cable and telephone companies, fiber providers and/or wireless services infrastructure companies, until now as part of this RUA permit proceeding. Unless and until the City legislates, neither the public nor the wireless infrastructure industry truly knows

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<sup>5</sup> Comments by architects filed with the City at the citizens' request in opposing the Crown DAS expansion plans assert a generalized community character impact from putting small antennas and equipment boxes on existing utility poles no bigger than other utility equipment already along residential streets. Those comments do not implicate an actual adverse environmental impact in the context of SEQRA. See Full EAF, Part II, Section 18 Question which, if not Type II, would require credible information that the DAS equipment is out of scale with the existing utility corridor and infrastructure to rise to the level of any impact let alone an adverse one.



December 1, 2016

Page -8-

how the City might address federal siting requirements applicable to wireless facilities installed in public rights of way. For now though, the electric utility can install new or larger poles without City permits, cable companies can continue to install WiFi transmitters without the need for City permits (which does create an eligible facility under federal law) and numerous other communications companies can deploy equipment without City permitting under Chapters 167 or 196 of the City Code.

As related specifically to Crown's DAS expansion plans in this administrative proceeding, Crown has proposed a larger and stealth equipment cabinet be permitted for deployment on utility poles. The purpose of the larger cabinet is to more readily permit future shared use of the neutral host DAS system by FCC licensed carriers other than Verizon Wireless. This to avoid the potential for future "pole clutter" to the extent practicable, a stated concern of citizens. Despite counsel's statements to the contrary, Crown and the City do have the ability to address how any future, albeit speculative, expansions of equipment might be treated by the City. This, coupled with practical and legal limits imposed by Consolidated Edison through its pole attachment agreement with Crown do provide legal mechanisms to address a purported concern of citizens.

Perhaps most telling though in relation to Section 6409 and FCC regulations is what counsel has not said in comparing the Citizens' Alternative Tower Plan to Crown's DAS expansion plans. If ever approved by the City, new towers would be permitted to extend 20' in height as a matter of law pursuant to 6409 and FCC regulations. Thus, the citizens' plan could yield a net effective 90' to 120' tower height potential for all 10 towers they have proposed, particularly for tower sites that would be located on private properties.

**The Citizens' Alternative Tower Plan Relies On Numerous Tower Sites  
That Neither It, Crown nor the City Controls**

For whatever reason, and perhaps based on counsel's erroneous application of the law in this administrative proceeding, certain citizens are under the impression that Crown must legally





December 1, 2016

Page -9-

evaluate the Citizens Alternative Tower Plan which proposes tower sites on several public and private properties in the City of Rye. To the contrary, even SEQRA recognizes (when preparing an Environmental Impact Statement)<sup>6</sup> that alternatives not under the control of a project proponent cannot be forced into analysis by the Lead Agency.<sup>7</sup> Town of Dryden v Tompkins Cnty. Bd. of Representatives, 78 N.Y.2d 331, 334 (1991). "It would be unrealistic, and, indeed, onerous to impose upon private [entities] the obligation to acquire alternative sites or options to purchase them and then submit all the sites to the lead agency for review and selection." Horn v Intl. Bus. Machines Corp., 110 A.D.2d 87, 95 (App. Div. 2d Dep't 1985), appeal denied, 67 N.Y.2d 602 (1986) (discussing reasonableness of the SEQRA alternatives analysis); Webster Assoc. v Town of Webster, 112 Misc. 2d 396, 410-11 (Monroe Co. Sup. Ct. 1981), aff'd, 85 AD2d 882 (App. Div. 4th Dep't 1981), rev'd on other grounds, 59 N.Y.2d 220 (1983) (private entities "will usually have a narrower range of feasible alternatives, due both to their more limited resources and . . . to the economic disadvantages of alternative sites which might be available to [the proponent] at a given time.").

### Conclusion

The Citizens' Alternative Tower Plan is simply not one Crown must pursue in this administrative proceeding. The City Council, which has discretion on whether to entertain tower siting on City properties it owns outside of the right of way, is indeed best positioned to weigh in on those

<sup>6</sup> "It is . . . well-settled in New York that preparation of an environmental impact statement (which includes a consideration of alternatives) is only required for actions that are likely to result in significant adverse environmental impacts. See N.Y. Env'tl. Conserv. L. § 8-0109 (agency required to "prepare . . . an environmental impact statement on any action . . . which may have a significant effect on the environment"). . . . [U]nder SEQRA, alternatives are considered when a proposal has the potential to generate significant adverse environmental impacts." Omnipoint Communications, Inc. v Vill. of Tarrytown Planning Bd., 302 F. Supp. 2d 205, 224-25 (S.D.N.Y. 2004). See also Lloyd v. Greece, No. 6924/2000 (Sup. Ct. Monroe Co., Sept. 14, 2000) (Galloway, J.), aff'd, 739 N.Y.S.2d 303, appeal dismissed in part, denied in part, 775 N.E.2d 1286 (N.Y. 2002).

<sup>7</sup> "In Part 617.9(5)(v) the regulations require that the draft EIS describe and evaluate 'the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor.' For private applicants, site alternatives should be limited to parcels owned by, or under option to, a private applicant. To demand otherwise would place an unreasonable burden on most applicants to commit to the control of sites which they do not otherwise have under option or ownership." NY DEC, SEQRA Manual, p.6 (3d ed. 2010).



December 1, 2016

Page -10-

aspects of the Citizens Alternative Tower Plan in response to the citizens' filing. Based on our firm's own past experience with wireless siting in the City dating back twenty years including litigation that predated the City's current version of Chapter 196 and prior efforts to site towers on City lands, we would be shocked if the City now decided to entertain multiple tower sites in the locations suggested in the Citizens Alternative Tower Plan. We would also be surprised if the Town of Rye, Shenerock Shore Club and other private property owners are actually interested in long term leases required for tower development on their properties. Regardless, a careful comparison to the Crown DAS expansion plan, which is a real and appropriate means to improve wireless services in Rye, can only lead to one rational conclusion –that the Citizens' Alternative Tower Plan is an illusory community impacting plan.

Very truly yours,

A handwritten signature in black ink, appearing to read "Chris Fisher", written over a horizontal line.

Christopher B. Fisher

Enclosure

cc: Mr. Marcus Serrano, City Manager  
Kristen Wilson, Esq., City Corporation Counsel  
Joseph Van Eaton, Esq., City Outside Counsel  
Daniel Richmond, Esq., Counsel for Citizens  
Crown Castle